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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKIE LON HICKS,

Defendant and Appellant.

F073067

(Super. Ct. No. CRM032631A)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Mark V. Bacciarini, Judge.

Solomon Wollack, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Nora S. Weyl, and Ian P. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Frankie Lon Hicks appeals his conviction for special circumstance murder as well as his sentence (life without parole, plus a consecutive term of 25 years to life for a firearm enhancement attached to the murder charge). Hicks challenges defense counsel's waiver of reporting of jury selection proceedings, raises several claims of ineffective assistance of counsel, and argues that the statute mandating a sentence of life without parole for special circumstance murder is unconstitutional. We reject all of these contentions. Hicks also argues that a recent ameliorative amendment to the relevant firearm enhancement statute applies retroactively to his case, requiring remand for resentencing. We agree with Hicks on this point and, accordingly, vacate his sentence and remand for resentencing. The judgment is affirmed in all other respects.

PROCEDURAL HISTORY

A Merced County grand jury returned an indictment charging Hicks with the willful, deliberate, and premediated murder of Casey Desalles (Pen. Code, §§ 187, subd. (a), 189),[1] and with intentionally and maliciously killing an animal (§ 597, subd. (a)). The murder charge carried special circumstance allegations to the effect that the murder was committed during a residential burglary (§ 190.2, subd. (a)(17)(G)) and by means of lying in wait (§ 190.2, subd. (a)(15)). The prosecution subsequently added an enhancement to the murder charge for personal and intentional discharge of a firearm resulting in death (§ 12022.53, subd. (d)). A jury convicted Hicks of both substantive counts and found the special circumstances as well as the firearm enhancement to be true.

The trial court sentenced Hicks, on the murder count, to life without the possibility of parole (LWOP), plus a consecutive sentence of 25 years to life for the firearm enhancement. The court also imposed a concurrent term of 16 months on the charge of intentionally killing an animal.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

FACTS

A. Prosecution's Case in Chief

1. Murder of Casey Desalles

Casey Desalles lived in the main house on a 20-acre ranch in Stevinson. A number of trailers were also located on the property. Desalles's friend, Anthony Davison, lived in one of the trailers. Davison's trailer did not have a bathroom so Davison used the bathroom in Desalles's house, the front door to which was usually unlocked. Desalles used another trailer on his property for growing marijuana, which he also sold. The trailer used for growing marijuana was padlocked on the outside.

On February 25, 2014, Davison had watched TV with Desalles at the latter's house until about 10:30 p.m. The next morning, February 26, 2014, Davison woke up around 5 a.m. and went, as usual, to use the bathroom in Desalles house. Inside the house, he found a shirtless Desalles lying on the floor. Desalles was cold to the touch, had some small holes in his side, and "there was a hatchet in his head." Davison immediately called 911.

Merced County Sheriff's deputies arrived at the house shortly. They located Desalles's dead body and also discovered that his dog was dead. A large safe in the bedroom was open and several guns were leaning against the bed. Adjacent to the house was a trailer containing marijuana plants; the trailer was secured with a padlock on the outside.

The deputies inspected the room in which Desalles's body was lying. The body was in a room with a bar, referred to during the trial as the barroom. The back door to the barroom was made of glass; the glass was broken and a small radio was lying on the floor just inside the door. The deputies found pieces of paper lying on and around Desalles's body. In addition, the deputies collected seven .22-caliber cartridge casings; another two casings were recovered the next day. Subsequent testing confirmed all the cartridge

casings were fired from the same gun. A cell phone was also recovered from the house. Deputies learned that the hatchet found in Desalles's head had been kept in the barroom for purposes of chopping firewood stacked outside the back door.

2. Arrests of Emilio Virgen and Hicks

On March 11, 2014, Merced County Sheriff's Detective Erick Macias received an anonymous tip to the effect that a Royce Hollister had information about the murder; the tipster also referred to an Emilio Virgen and a Frankie Lon Hicks and mentioned that a homemade silencer made of a plastic bottle and pieces of paper was used in the murder. Macias and Detective Mike Ruiz contacted Hollister on March 26, 2014. Hollister referred the detectives to Emilio Virgen. Macias and Ruiz interrogated Virgen the following day. Virgen was initially evasive. However, after he was made aware of the detectives' contacts with Hollister, Virgen revealed that, on the night in question, he went with Hicks to Desalles's property, to steal marijuana; Hicks went into the house and killed Desalles, while Virgen waited in the car. Virgen was arrested. Later that night, Detective Ruiz arrested Hicks and transported him to the sheriff's department for interrogation; sheriff's deputies also searched Hicks's house.

3. Hicks's Police Interrogation

Detectives Macias and Ruiz interrogated Hicks at the sheriff's department. Hicks admitted he killed Desalles as part of an attempt to steal the marijuana the latter grew in the trailer behind his house. Hicks told detectives he knew, from "word of mouth," that Desalles "harvest[ed] hundreds of pounds [of marijuana] every year." Hicks believed that, at the time of the murder, Desalles had a "[s]hitload of weed," "about a hundred pounds," in the trailer. Hicks and Virgen talked for months about stealing Desalles's trove of marijuana. Hicks even had "a buyer for the pot." Two days before the murder, Hicks scouted out Desalles's property. He sneaked into Desalles's house while the latter slept, to look for the key to the marijuana trailer's padlock but did not find it.

On the night of the murder, Hicks and Virgen left Hicks's house in Hicks's white Honda. Hicks had a .22-caliber semi-automatic rifle and a .12-gauge shotgun, both of which he loaded during a stop in an orchard on the way to Desalles's ranch. At the end of the barrel of the .22, he fitted a homemade silencer—one he had made by filling an empty apple juice bottle with strips of paper that had been duct-taped together. He also brought along a piece of pipe in case the gun failed to work. Hicks wore a ski mask; both Hicks and Virgen wore gloves and stuck duct tape on the bottoms of their shoes. Hicks eventually parked on a road behind Desalles's house and approached the house, through "empty fields," on foot. Virgen stayed in the car. They communicated via walkie-talkies.

At approximately 2:00 a.m., Hicks crept into Desalles's house through an unlatched glass backdoor leading to the barroom. He hid behind the bar. Desalles was watching TV in another room. Hicks made various "noises" to lure Desalles into the barroom, so as to bring him out of his "safety zone" and into Hicks's "kill zone." The idea was to "ambush" Desalles. Finally, Hicks threw a transistor radio "type-thing" towards the back door, breaking part of the glass backdoor. Desalles came into the room, whereupon Hicks shot him eight times with the .22-caliber rifle. Hicks noted that he shot Desalles "[a]s soon as [he] saw [Desalles]" enter the room. Desalles's dog was barking, so Hicks "took out" the dog, by hitting it "in the back of the head with a hatchet" he found in the room. Meanwhile, Desalles continued to roll about "more than what [Hicks had] ever seen any other dead body do," indicating ongoing "brain activity." Hicks then shot Desalles a few more times and hit him a few times with the hatchet as well. Hicks switched to the hatchet because his homemade silencer would likely have stopped working by then. He explained that his "method of silencing the gun is limited to a certain amount of shots," after which the "bottle starts cracking" and cannot "hold the pressure."

Hicks quickly looked around the house for other people and then began searching for the key to the padlock on the marijuana trailer. He had brought a bolt cutter with him but did not want to use it because of the noise it would make. He "went through" an open safe, setting aside the guns that were in it. However, he did not find the padlock key. Hicks then told Virgen to come to the house, so as to deploy another set of hands and eyes in the search for the padlock key. Hicks saw a text message on Desalles's phone indicating that someone was coming over to the house. He and Virgen went to the marijuana trailer to try to cut off the padlock with the bolt cutter, but the bolt cutter broke at "the hinge." Since they were nervous that someone was heading to the house, they decided to leave. All they took from the house was a duffle bag with some "crappy ass weed."

Hicks and Virgen drove straight to the Delta-Mendota Canal near Crows Landing. Hicks threw the .22-caliber rifle, the walkie-talkies, the ski mask, and various articles of clothing into the canal. He burned the duffel bag on the canal bank.

Hicks said he felt bad about killing the dog but not Desalles, who was a "piece of shit" and a "tweak." Hicks said he had killed other people as well. He described himself as a "fucking sociopath" and said that killing was "better was sex." He said he had fantasized about killing someone since he was about five years old and needed to be "put away." However, Hicks was worried about any consequences for Virgen. Although Hicks acknowledged that Virgen was aware, based on their discussions in planning the crime, of the possibility that Desalles would be killed, Hicks emphasized that Virgen would not have expected that actually to occur. Hicks said he wished he had told his parents about his sociopathy.

4. Physical Evidence

Hicks led sheriff's detectives to the part of the canal where he had dumped the gun and other items after Desalles's murder. The detectives found .22-caliber shell casings

and a duffel bag with containers of a green, leafy substance along the canal bank. Subsequently, law enforcement divers recovered from the canal a Remington .22-caliber rifle with a homemade silencer attached to the end of the barrel, two silver .22-caliber magazines that were taped together (one of the magazines contained four live bullets), and two walkie-talkies.[2]

As for the prior search of Hicks's house, it had turned up a .12-gauge shotgun; a duffel bag containing marijuana-filled glass jars; a chrome magazine that was identical to the magazines recovered from the canal; several clear plastic bottles that appeared to have been shot through (one of which was the same type of apple juice bottle as was fitted on the .22-caliber rifle as a silencer); and a paper shredder containing shredded paper.

A search of Desalles's cell phone confirmed that he had received a text indicating that someone was headed to his house, consistent with Hicks's statement to the police.

A forensic pathologist who conducted the autopsy on Desalles's body testified that the cause of Desalles's death was "[m]ultiple gunshot wounds and chop wounds of the head." There were 10 separate bullet-entry wounds on Desalles's body; nine bullet projectiles were also recovered from the body. One of the bullets appeared to have traveled through Desalles's hand before striking another part of his body, potentially explaining the discrepancy between the number of entry wounds and the number of bullets identified. The left side of Desalles's face had five chop wounds. Nine bullet casings found near Desalles's body were determined to have been fired from the same gun.

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[2] Detective Macias testified that magazines are taped together to enable fast, "tactical reloading." He explained that when one magazine is emptied, it can be turned over and quickly switched with the second one.

5. Virgen's Trial Testimony

Virgen initially faced a murder charge for his role in Desalles's killing but eventually reached a more favorable resolution in exchange for testifying against Hicks. Specifically, he pleaded guilty to first degree burglary, multiple counts of conspiracy to commit second degree burglary, trespassing, and three counts of possession of stolen property. He received a 14-year prison sentence.

Virgen and Hicks grew up together as friends and neighbors. They knew Desalles grew marijuana and, in the weeks leading up to the murder, made plans to rob him. The plan was for Hicks to go into the house and gain access to the marijuana trailer. Virgen would join Hicks when Hicks was ready for him. The plan was to commit a burglary only.

On the night of the crime, Hicks gave Virgen gloves, duct tape for the bottoms of his shoes, and a walkie-talkie. Hicks drove them to the vicinity of Desalles's ranch. Hicks got out of the car carrying a long gun with a homemade silencer made of a plastic bottle and paper. About 20 minutes later, Hicks told Virgen, via walkie-talkie, to "come through." Virgen drove the car over to the front of the house and went in. He saw that Desalles and the dog were dead. Virgen was surprised because he "didn't really think it was going to happen." Virgen took a duffle bag of marijuana from the garage. Hicks told Virgen that a text on Desalles's cell phone indicated that someone was headed to the house. Hicks and Virgen tried to get into the marijuana trailer outside the house but were foiled by the padlock on it. As they drove home, Hicks told Virgen he had shot Desalles. Virgen disposed of his shoes and gloves on the side of the road and his jacket in the canal.

A video recording of Virgen's police interrogation was also played for the jury during his trial testimony. During the interrogation, Virgen said that, before the night of the murder, Hicks had talked about the possibility of hurting or killing Desalles. Virgen

had told Hicks, "'I don't wanna be, you know, the one, you know, I ain't involved with that shit. I ain't no killer,' you know?" Virgen said that Hicks was crying after shooting Desalles.

B. Defense Case

1. Hicks's Trial Testimony

Hicks testified on his own behalf. He started using marijuana recreationally as a teenager but stuck with it because it relieved symptoms associated with celiac disease, from which he suffered. Hicks acknowledged that he knew Desalles was a marijuana grower and dealer and had discussed stealing Desalles's marijuana with Virgen. They believed Desalles would have between 60 and 100 pounds of harvested, dried marijuana.

On the night of the murder, between midnight and 1:00 a.m., Hicks went to Desalles's house with Virgen. Stevinson, where Desalles's house was situated, was about a 45-minute drive away from Crows Landing. Hicks took a .22-caliber rifle equipped with a homemade silencer created with an empty plastic bottle filled with pieces of paper. His plan was to enter the house, lure Desalles outside, and then surprise the latter by posing as a sheriff's deputy and asking for the marijuana. Hicks acknowledged he was not wearing a uniform and, contradicting his police statement, denied wearing a ski mask. Hicks also testified that his plan went terribly wrong.

On the night in question, Hicks entered Desalles's house and hid in the barroom. He tried making various noises to get Desalles to go outside. Instead, Desalles came into the barroom to investigate and picked up a hatchet from the bar. Hicks was wedged in behind the bar in a low crouch and was having difficulty moving; he was frozen in position as a result of kneeling for a long time. Desalles walked towards Hicks, ignoring Hicks's command to stop and drop the hatchet. Hicks fired a shot, hoping that Desalles would let him get up and leave. Instead, Desalles raised the hatchet. Gripped by fear, Hicks shot Desalles. At one point, he switched out the magazine in the rifle and, in "pure

panic," kept shooting. Eventually, Desalles fell down. Desalles's dog was barking so Hicks tried to calm it down; when he could not, he hit it with the hatchet and killed it. Hicks turned around and saw Desalles reaching for the rifle, which Hicks had set down. Hicks then hit Desalles with the hatchet a number of times. At that point, Hicks told Virgen, over walkie-talkie, to come to the house. Virgen pulled up in the car and ran into the house. Hicks and Virgen soon fled the house without even attempting to break into the marijuana trailer. They drove to the Delta-Mendota canal by Crows Landing and threw the .22-caliber rifle, various items of clothing, and the walkie-talkies into the water.

Hicks testified that when he saw the police arrive at his house on the day of his arrest, he ran into his room and swallowed about 18 grams of honey oil, a form of concentrated cannabis. He had never before consumed such a large quantity of honey oil in one go and was "really high" during his subsequent interrogation. As a result, he said outlandish things. Later, upon viewing the videotape of the interrogation, he was in shock because those statements were not true. Hicks was also concerned about protecting Virgen at the time of the interrogation, a continuing priority for him. Hicks felt "terrible" about what he did to Desalles.

C. Prosecution's Rebuttal

The People called an expert on narcotics in their rebuttal case. The expert testified that a person who ingested 12 to 18 grams of honey oil would be rendered comatose and unable to respond to questioning in a comprehensible manner. The expert acknowledged that honey oil is a "highly hallucinogenic" substance that can cause people to become delusional.

DISCUSSION

I. Counsel's Waiver of Reporting of Jury Selection Proceeding

Hicks argues that the trial court violated his Fourteenth Amendment due process right to "meaningful appellate relief" in permitting defense counsel to waive the reporting

of jury voir dire rather than taking a personal, on-the-record waiver from Hicks for this purpose. Hicks further argues the trial court's error was structural. We reject Hicks's contentions.

A. Background

Prior to jury voir dire, in the presence of the defendant, the court and counsel discussed various trial stipulations, including a stipulation waiving reporting of the voir dire proceeding. This stipulation provided: "VOIR DIRE REPORTING: The presence of a court reporter is waived for voir dire." The stipulation was signed by the court, defense counsel, and the prosecutor. The following colloquy occurred in connection with the stipulation:

> "THE COURT: Let's go on the record. This is the matter of the People versus Hicks. Mr. Hicks is present accompanied by [defense counsel]. [The prosecutor] is here from the DA's office.
>
> We're discussing the Court's standard trial stipulations. It appears the defense is okay with them…. [¶]
>
> "[DEFENSE COUNSEL]: Yes, that's true, Your Honor….
>
> And in this case I have no problems with … waiving a reporter for voir dire.
>
> "THE COURT: The only time an issue would come up – and I don't expect it. I've not had it come up in my five years on the bench – is Batson-Wheeler issue.
>
> "[DEFENSE COUNSEL]: Yeah, that did come to mind, but if nothing else, we would start by going out of the presence of the jury.
>
> "THE COURT: Correct, and take the reporter with us.
>
> "[DEFENSE COUNSEL]: So that's fine. Yeah, I agree with all of those. I will execute this.
>
> "THE COURT: All right. Thank you.
>
> So, madam reporter, you needn't report voir dire."

B. Analysis

"'An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.… [¶] 'It is therefore clear that the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper.'" (*In re Walker* (1976) 56 Cal.App.3d 225, 227 (*Walker*), quoting *McKane v. Durston* (1894) 153 U.S. 684, 687-688.) In turn, "California has made the right to appeal a statutory creature whose scope and authority is only as specifically delineated." (*Walker*, *supra*, at p. 227; *People v. Mazurette* (2001) 24 Cal.4th 789, 792 ["'It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.'"]; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1659 ["The right to appeal a criminal conviction has no roots in the United States or California Constitutions and is a statutory right only."].) However, "[o]nce appellate review is established it must be kept free from any procedures which violate due process or equal protection of the law." (*Walker*, *supra*, at p. 227.)

Hicks argues that, by waiving reporting of the jury selection proceeding, his trial counsel effectively waived his right to appeal. Noting that the right to waive an appeal is "one of the rare fundamental rights" which the accused must waive personally, he further contends that "if the defendant must personally make the decision to waive an appeal, he must also personally waive the corresponding right to be furnished with a transcript necessary to that appeal." (See, e.g., *People v. Panizzon* (1996) 13 Cal.4th 68, 80 ["Just as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as

a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement."].)

To the extent Hicks argues that counsel's waiver of the reporting of jury selection proceedings effectively amounted to a waiver of his right to appeal altogether, that argument is unavailing. Counsel only waived reporting of a limited proceeding, i.e., jury selection, while reserving the right to request a reporter at any point in the course of that proceeding. Counsel's limited, qualified waiver of reporting of jury selection cannot be equated to a situation where counsel, on his own, waives the defendant's right to appeal altogether. Even assuming counsel's waiver negatively impacted Hicks's appeal, there is no authority for the proposition that a personal waiver from the defendant is required with respect to every action by counsel that forecloses an issue on appeal. Furthermore, as discussed below, the terms of the statute governing the reporting of trial court proceedings in non-capital criminal cases supports our conclusion that counsel's waiver was valid and proper.

California statutes not only provide for the right to appeal but further provide for the reporting of trial court proceedings, so as to "allow access by an appealing defendant in a criminal case to '"'a record of sufficient completeness'" to permit proper consideration' of his appeal." (*In re Armstrong* (1981) 126 Cal.App.3d 565 (*Armstrong*).) Thus, section 190.9 provides for the reporting of trial court proceedings in capital cases. Section 190.9, subdivision (a)(1) states: "In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present." As for non-capital cases, Code of Civil Procedure section 269, subdivision (a)(2) (CCP 269(a)(2)), provides for the reporting of proceedings in non-capital felony cases, which reporting

occurs at state expense. (See Gov. Code, § 69952.) Code of Civil Procedure section 269 provides:

> "(a) An official reporter or official reporter pro tempore of the superior court shall take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer, in the following cases: [¶] … [¶]
>
> "(2) In a felony case, on the order of the court or at *the request* of the prosecution, the defendant, or the attorney for the defendant." (Italics added.)

Under CCP 269(a)(2), in a felony case, a defendant, either personally or through his counsel, may *request* transcription of trial court proceedings, including objections made, rulings of the court, and statements and remarks made and oral instructions given by the judge, or the trial court may order it. (See, e.g., *People v. Goudeau* (1970) 8 Cal.App.3d 275, 279-280 ["In California felony proceedings a court reporter must be present *if requested* by the defendant, the district attorney, or on order of the court. (Code Civ. Proc., § 269.)" (Italics added.)]; *People v. Manson* (1976) 61 Cal.App.3d 102, 214 [CCP 269(a)(2) provides for the reporting of trial court proceedings upon request].) The purview of CCP 269(a)(2) encompasses jury selection proceedings, since counsel makes objections, and the trial court makes statements, remarks, and rulings and gives instructions, during such proceedings. (See *Darcy v. Moore* (1942) 49 Cal.App.2d 694, 699 [CCP 269(a)(2) encompasses jury selection proceedings].) In *Armstrong, supra*, 126 Cal.App.3d 565, the Court of Appeal extended the right to request transcription granted to felony defendants by CCP 269(a)(2), to misdemeanor defendants as well. *Armstrong* held that, the right to appeal necessitates the provision of a mechanism ensuring adequate appellate review, whereby the "state shall provide, *upon the defendant's request*, some method of recording verbatim, the testimony and other oral

proceedings of a *felony or misdemeanor* criminal action." (*Armstrong, supra,* at p. 573 (italics added).)

Hicks's argument that the trial court was required to obtain a personal, on-the-record waiver of his right to reporting of the jury selection proceeding is foreclosed by CCP 269(a)(2) itself, which expressly states that reporting of trial court proceedings in a non-capital felony case is available upon order of the court or the *request* of the defendant, defense counsel, or the prosecutor. CCP 269(a)(2) thus protects a defendant appearing in propria persona by extending to him the right to request the reporting of trial court proceedings and further, also permits a defendant's attorney to request the reporting of proceedings on the defendant's behalf.[3] Since CCP 269(a)(2) extends the right *to request* reporting of proceedings to both a defendant and counsel, it follows that both may also forfeit or waive this right on the defendant's behalf. Here, Hicks, who was represented by counsel, did not request reporting of the jury selection proceeding, thereby forfeiting his right to do so. Furthermore, defense counsel expressly and affirmatively waived in open court, in Hicks's presence, reporting of the jury selection proceeding and subsequently executed a written stipulation to this effect. (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1264 (*Turner*) [under CCP 269, non-capital defendants have only a "statutory right to have the proceedings recorded and prepared by a certified shorthand reporter, which right can be waived" by the defendant or his attorney]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1333, fn. 70 [in criminal matters, parties may waive right to have certain proceedings reported], overruled on other grounds by *People v. Merritt* (2017) 2 Cal.5th 819; *People v. Rogers* (2006) 39 Cal.4th 826, 857 [in capital

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3 See *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 542 [under *Armstrong, supra,* 126 Cal.App.3d 565, a misdemeanor defendant has the same right, under equal protection principles, as a felony defendant *to request* a verbatim record and court must instruct defendants *appearing in propria persona* of this right].)

case, defense counsel properly waived right to have discussions of juror hardship questionnaires reported] (*Rogers*).) *Turner* explained that since the right to transcription under CCP 269(a)(2) is a statutory right, the only requirement bearing on counsel's waiver of this right is voluntariness, which is satisfied when counsel "'"'"'freely acquiesce[s]'"'"' to the waiver on the record. (*Turner*, *supra*, at p. 264.)

It bears iteration that counsel effected only a limited, qualified waiver here. Counsel's waiver concerned just the jury selection phase of the trial and counsel reserved the right to request a court reporter at any point during jury selection, for example, in the event that counsel lodged an objection, among other scenarios. We conclude there was no error under CCP 269(a)(2) here; nor has Hicks shown that his Fourteenth Amendment due process rights were violated. Indeed, because Hicks affirmatively and properly waived the reporting of the jury selection proceeding, he may not complain on appeal about the putative inadequacy of the record of that proceeding. (See, e.g., *Rogers*, *supra*, 39 Cal.4th at p. 857 [defense counsel's suggestion in capital case that discussions of juror hardship questionnaires need not be transcribed waived complaint of inadequate record on appeal]; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1333, fn. 70; see also *People v. Mickey* (1991) 54 Cal. 3d 612, 667 [failure to object in trial court forfeits claim of inadequate appellate record of juror excusals].) Hicks's claim that he was prejudiced by the lack of transcription is therefore foreclosed and his citations to cases addressing prejudice to defendants on account of lost records are, in turn, unavailing.

In sum, while we do not endorse a generalized practice of a trial court inviting a stipulation to relieve the court reporter from reporting jury selection, or trial counsel [defense counsel or the prosecutor] entering into such a stipulation, we do not find error by this trial court and certainly no structural error.

II. Ineffective Assistance of Counsel for Waiver of Reporting of Jury Selection

Hicks argues, in the alternative, that counsel was ineffective for having waived the reporting of the jury selection proceeding. To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see *People v. Hester* (2000) 22 Cal.4th 290, 296.) Here, the record, including the settled statement of the jury selection proceeding, does not suffice for purposes of assessing prejudice arising from counsel's waiver of reporting of the jury selection proceeding. Hicks therefore cannot succeed on a claim of ineffective assistance of counsel on appeal and the matter is best addressed in habeas corpus proceedings. Although Hicks points to two jurors' potentially disqualifying responses in jury questionnaires contained in the record, as he acknowledges, we cannot determine whether these points were addressed and cleared up during voir dire.[4] In addition, even had the jury selection proceedings been transcribed, claims of ineffective assistance of counsel would nonetheless likely have to be litigated in habeas proceedings so as to develop a record of counsel's tactical choices and strategy in relation to the composition of the jury. (See, e.g., *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 (*Mendoza Tello*).)

Hicks, however, argues that counsel's qualified waiver of reporting of the jury selection proceeding was tantamount to a complete deprivation of counsel at jury selection and for purposes of appeal, requiring per se reversal. This argument is

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[4] For example, Hicks points to a response by one juror in his juror questionnaire that he would not favor either side "because each has to prove their case." However, the record also shows that the trial judge assured the parties that he would "hit reasonable doubt hard, People's burden of proof" during jury selection proceedings.

unpersuasive because the authorities Hicks relies on are inapplicable to the situation that appears here. In the cases cited by Hicks, the records on appeal or collateral review concretely demonstrated that the respective counsel's performance was deficient to the point that the defendants were denied assistance of counsel altogether. Under the circumstances that apply here, any claim that counsel's performance amounted to a denial of counsel would have to be addressed in habeas proceedings.

III. Ineffective Assistance of Counsel for Failure to Request CALCRIM No. 522

First degree murder is reduced to second degree murder when premeditation and deliberation are negated by heat of passion arising from provocation. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296.) Unlike the objective heat of passion inquiry in the context of voluntary manslaughter, the test of provocation sufficient to preclude deliberation and premeditation is entirely subjective. "If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 (*Hernandez*).) More specifically, the test is whether "the defendant's decision to kill was a direct and immediate response to the provocation such that the defendant acted without premeditation and deliberation." (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 329.)[5] Thus, the provocation sufficient to mitigate first degree murder to second degree murder requires only a finding that the defendant's subjective mental state was such that he did not deliberate and premeditate before deciding to kill. (*Fitzpatrick, supra,* at pp. 1295-1296.)

Hicks argues that defense counsel was ineffective for failing to request the trial court to instruct the jury pursuant to CALCRIM No. 522, the pattern instruction on the

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5 *Wickersham* was overruled on another ground by *People v. Barton* (1995) 12 Cal.4th 186, 201.

subjective provocation defense to premeditated and deliberated first-degree murder. CALCRIM No. 522 provides: "Provocation may reduce a murder from first degree to second degree.… The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder."

CALCRIM No. 522 is a pinpoint instruction. Accordingly, the trial court is not required to sua sponte instruct the jury under CALCRIM No. 522; rather, the court must instruct pursuant to CALCRIM No. 522 upon defense request, when there is substantial evidence to support the instruction. (See *People v. Wilkins* (2013) 56 Cal.4th 333, 348-349, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1119 ["Pinpoint instructions 'relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case'" and must be given on request "'when there is evidence supportive of the theory.'"]; *People v. Rogers* (2006) 39 Cal.4th 826, 878 (*Rogers*) ["Because CALJIC No. 8.73 [CALJIC No. 873 is the CALJIC analog of CALCRIM No. 522] relates the evidence of provocation to the specific legal issue of premeditation and deliberation, it is a 'pinpoint instruction.'"]; *People v. Mayfield* (1997) 14 Cal.4th 668, 778 [CALJIC No. 8.73 is a pinpoint instruction because it "relates particular facts to an element of the charged crime and thereby explains or highlights a defense theory"], disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1732-1734 [CALJIC No. 8.73 is a pinpoint instruction because it relates certain evidence to element of offense so as to raise reasonable doubt as to that element]; *People v. Middleton* (1997) 52 Cal.App.4th 19, 30-33 [CALJIC No. 8.73 is pinpoint instruction to be given on request], disapproved on another ground in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752, fn. 3.)

Contradicting his police statement, Hicks testified at trial that he shot Desalles when Desalles came at him with a hatchet and refused to put it down even when Hicks told him, at gunpoint, to do so. In light of Hicks's testimony, defense counsel requested an instruction on imperfect self-defense, which the court denied. Hicks acknowledges that the court correctly denied counsel's request for an instruction on imperfect self-defense because imperfect self-defense is inapplicable when the victim is legally justified in resorting to self-defense against the defendant, as a result of the defendant's own conduct. (See *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179.)

Although counsel requested an instruction on imperfect self-defense, he did not request one on subjective provocation, i.e., CALCRIM No. 522. As stated above, Hicks argues counsel was ineffective on account of this failure. He argues: "[Hicks's] testimony, if believed, established that he did not act with premeditation or by lying in wait. And the reason he did not act with premeditation or by lying in wait was because of perceived provocation which put him in fear and caused him to act rashly. That is the very situation which the heat of passion second degree murder doctrine covers."

Here the jury was instructed on a "deliberation and premeditation" theory of first degree murder. In connection with this theory, it was told that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." (CALCRIM No. 521.) Further, as an alternative to the "deliberation and premeditation" theory of first degree murder, the jury was instructed on the lying in wait theory of first degree murder.[6] (*People v. Stanley* (1995) 10 Cal.4th 764, 794 ["To prove first degree

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6 Specifically, the trial court stated:

"The defendant has been prosecuted for first degree murder under two theories: (1) 'the murder was willful, deliberate, and premeditated' and (2) 'the murder was committed by lying in wait.' [¶] Each theory of first degree murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty

murder of any kind, the prosecution must first establish a murder within section 187—that is, an unlawful killing with malice aforethought. [Citations.] Thereafter, pursuant to section 189, the prosecution must prove the murder was perpetrated by one of the specified statutory means, including lying in wait."].) The jury found Hicks guilty of first degree murder.

The jury was also instructed on the special circumstance of "murder committed by means of lying in wait." (CALCRIM No. 728.) The jury returned a true finding on the special circumstance allegation of murder by means of lying in wait. "'The lying-in wait special circumstance requires "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage."'" (*People v. Moon* (2005) 37 Cal.4th 1, 22; *People v. Wright* (2015) 242 Cal.App.4th 1461, 1496 (*Wright*) ["'[L]ying in wait "[is] the functional equivalent of proof of premeditation, deliberation, and intent

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of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.

"The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation.… [¶] … [¶]

"The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

"1. He concealed his purpose from the person killed;

"2. He waited and watched for an opportunity to act; [¶] *AND* [¶]

"3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed.

"The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation and premeditation."

to kill.”””].) The jury would thus necessarily also have found Hicks guilty of murder by lying in wait, which is first degree murder. (See *Wright*, *supra*, at p. 1496.)

Significantly, provocation is irrelevant to first degree murder by means of lying in wait. (*People v. Battle* (2011) 198 Cal.App.4th 50, 75 [“if the jury found murder by lying in wait, provocation was irrelevant because the murder could not be reduced to second degree murder”].) Accordingly, the failure to instruct the jury on subjective provocation pursuant to CALCRIM No. 522 is generally harmless when, as here, the jury found true a lying in wait special circumstance. (See *Wright*, *supra*, 242 Cal.App.4th at pp. 1496-1497 [error in failing to give instruction on provocation, as basis for reduction of murder from first to second degree, was harmless based on true finding as to lying in wait special circumstance]; also see *People v. Cruz* (2008) 44 Cal.4th 636, 665 (*Cruz*) [a lying in wait special circumstance finding renders the failure to instruct on provocation/heat of passion manslaughter harmless error].) Under the facts of this case, we conclude that counsel’s failure to request an instruction on subjective provocation, i.e., CALCRIM No. 522, was harmless under any standard of prejudice, in light of the jury’s true finding on the lying in wait special circumstance. Accordingly, Hicks’s claim that counsel was ineffective for failing to request such an instruction fails.

Hicks, however, contends that the foregoing authorities do not foreclose his claim of ineffective assistance of counsel, because counsel’s failure to request CALCRIM No. 522 must be evaluated in light of his further failure to present evidence of Hicks’s good character from his friends and family. Based on character letters from friends and family that counsel submitted on Hicks’s behalf at sentencing, Hicks argues that counsel was ineffective in failing to call the people who wrote the letters as trial witnesses. He asserts character evidence from these witnesses would have resulted in a better outcome for him with respect to the jury’s true finding on the lying in wait special circumstance. Hicks suggests that counsel’s failure to present character evidence and his failure to request

CALCRIM No. 522, *taken together*, prejudiced his defense. However, regarding the existence of good character evidence, Hicks points only to the letters submitted on his behalf at sentencing, nothing more. This minimal record is entirely inadequate to assess whether counsel should have called the people who wrote these letters as trial witnesses, and to evaluate the consequences of opening the door for the prosecution to present potentially bad character evidence concerning Hicks. (See *Mendoza Tello*, *supra*, 15 Cal.4th at p. 267 [an appellate court should not "brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed"].) Accordingly, we reject Hicks's contention that counsel was ineffective in failing to present character evidence, and in turn, in failing to request CALCRIM No. 522.

IV. Cumulative Error

Hicks contends there was cumulative error. A series of errors, though independently harmless, may in some circumstances rise to the level of reversible and prejudicial error. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Hill* (1998) 17 Cal.4th 800, 844.) That is not the case here as there are either no errors or any error was not prejudicial.

V. Cruel and Unusual Punishment

Section 190.2, subdivision (a) prescribes a mandatory LWOP sentence for any defendant convicted of special circumstance murder. Hicks, who was 21 years old when he murdered Desalles, was sentenced to LWOP under this section. He now argues that "section 190.2, subdivision (a) violates the Eighth Amendment's prohibition on cruel and unusual punishment insofar as it deprives the sentencing court of the discretion to consider a young adult defendant's youth and immaturity, and to impose a sentence less than LWOP."

Hicks essentially argues that, given his relatively youthful age at the time of commission of the murder, the rationale of *Miller v. Alabama* (2012) 132 S.Ct. 2455,

2460 (*Miller*), should apply to his case. In *Miller*, the United States Supreme Court held that the "Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." (*Id*. at p. 2469.) More specifically, *Miller* held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" (*Miller*, *supra*, at p. 2460.) In reaching its holding, *Miller* relied "extensively on differences between juveniles and adults with regard to their culpability and capacity for change." (*People v. Gutierrez* (2004) 58 Cal.4th 1354, 1360.) *Miller* explained that the "distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." (*Miller*, *supra*, at p. 2465.) *Miller* did not foreclose LWOP sentences for juveniles in homicide cases but held that before a minor could be so sentenced, the sentencing judge or jury was required to have an opportunity to consider the mitigating qualities of youth, in particular, "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id*. at p. 2469.)

Miller's prohibition on mandatory life without parole sentences under the Eighth Amendment is limited to defendants who were under the age of 18 when their crimes were committed, since that is the point where society draws the line between childhood and adulthood for many purposes. (See *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.) In *People v. Caballero* (2012) 55 Cal.4th 262, 268, the California Supreme Court concluded that, under a line of United States Supreme Court cases culminating in *Miller*, "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." Thus, the highest courts of the country and the state have drawn the line at 18 years of age, with respect to consideration of the special characteristics of youthfulness for sentencing

purposes, in the context of the Eighth Amendment. We, in turn, are bound by these holdings. (See *People v. Perez* (2016) 3 Cal.App.5th 612, 617.) Accordingly, we reject Hicks's argument that section 190.2, subdivision (a) violates the Eighth Amendment's prohibition on cruel and unusual punishment because it precludes consideration of the relative youthfulness of defendants like Hicks, who were in their early twenties when the relevant crime was committed.

VI. Firearm Enhancement of 25 Years to Life (§ 12022.53, subd. (d))

Senate Bill No. 620 (2017-2018 Reg. Sess.), signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1.)

The new legislation thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the trial court imposed a firearm enhancement of 25 years to life under section 12022.53, subdivision (d). Hicks argues the amendment to section 12022.53 is retroactively applicable to his case under *In re Estrada* (1965) 63 Cal.2d 740, 745, because it potentially mitigates punishment. The People concede the amendment is retroactive under *Estrada*. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [applying Senate Bill No. 620 to case not yet final when law became effective], *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].) Both parties further request remand of the matter to give the trial court an opportunity to consider striking the firearm enhancement under section 12022.53, subdivision (h) as amended by Senate Bill No. 620. Accordingly, we will vacate Hicks's sentence and remand the matter for resentencing.

DISPOSITION

The sentence is vacated and the case remanded to the trial court for resentencing in light of section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (2017-2018 Reg. Sess.; Stats. 2017, ch. 682, § 1). The judgment is otherwise affirmed.

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SMITH, J.

WE CONCUR:

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LEVY, Acting P.J.

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DESANTOS, J.